

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 38 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1 & 3 to 5 No. No.2 Yes.

PURUSHOTTAM GOPAL CHAUDHARI

Versus

HARCHAND SHIVRAM CHAUDHARI

Appearance:

MR JV DESAI for Appellants.

MR HB SHAH for Respondent.

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21/04/98

ORAL JUDGEMENT

This is defendants Second Appeal.

The brief facts giving rise to this appeal are as under :

The plaintiff - respondent filed a suit for recovery of possession of the disputed land and also for recovery and mesne profits on the allegation that the the

disputed two plots were originally owned by Ravjibhai Shivram, real brother of the plaintiff - respondent. Ravjibhai died somewhere in 1943. Kesarbai was his widow. She was given two suit fields in lieu of her maintenance by way of limited estate. Kesarbai having no right to transfer the said fields transferred the same to the defendant her sister's son through a sale-deed dated 10.5.1956 for a sum of Rs.4,000/-. It was alleged that the said sale-deed was bogus so as to nullify the rights of the plaintiff-respondent over the said property. The defendant on the basis of the sale-deed got his name entered in the revenue record. The plaintiff being the reversioner claimed inheritance over the suit property after the death of Kesarbai. The plaintiff-respondent filed earlier Suit No.58/66 claiming declaration that the sale-deed executed by Kesarbai was null and void and prayer was also made for setting aside the same. The defendant was also party in the earlier suit. The suit was decreed and only declaratory relief was granted on 11.8.1969. Thereafter, the defendant filed an appeal which was dismissed on 29.7.1972 being time barred. Since possession was not delivered inspite of the aforesaid litigation the instant suit was filed.

The defendant resisted the suit on the ground that the disputed land was self acquired property of the husband of Kesarbai and she was entitled to enjoy the said properties as absolute owner. She inherited the properties in suit from her husband who died on 18.1.1943. After the death of Bai Kesar the defendant also claimed entitled to the said property by inheritance as heir of Bai Kesar. It was also pleaded that the plaintiff has no right in the disputed property. The sale-deed was said to be valid. Regarding the earlier judgment in the earlier litigation it was pleaded that the same is not binding upon the defendant because he was not given opportunity of hearing. Plea of adverse possession and limitation was also taken by the defendant. Another plea was that the defendant was cultivating the suit plots through Kesarbai and as such he would be deemed to be tenant under the provisions of section 4 of the Tenancy and Agricultural Lands Act, 1948. The maintainability of the previous suit was also challenged.

The Trial Court decreed the suit of the plaintiffs repelling the contention of the defendant. An appeal was filed which was also dismissed. Hence, this Second Appeal.

The following substantial questions of law were

formulated in this appeal :

A Whether the lower Court has erred in not framing the issue regarding deceased defendant being a deemed tenant and in not referring the same to the competent authority under section 85A of the Bombay Tenancy Act, 1948 ?

B Whether the lower Court has erred in not appreciating that the suit fields were self acquired property of Bai Kesar's deceased husband Ravjibhai and whether as his legatee she had inherited the same and was entitled to transfer the same ?

Coming to the first substantial question it may be observed that the learned Counsel for the appellant did not press this substantial question at the time of argument. It may however be mentioned that the suit was filed by the plaintiff for recovery of possession and mesne profits. The plaintiff could succeed only on the strength of his case. If the defendant wanted to demolish the case of the plaintiff on several grounds it was not necessary for the trial court to frame issues on all irrelevant pleas. It is only on pleadings regarding material facts which were denied by the defendant that issues could be framed on such a point. The plaintiff claimed that Kesarbai had only limited estate on 10.5.1956 and that she was not absolute owner of the property under section 14 of the Hindu Succession Act, hence, she had no right to transfer the land to third party. The defendant claimed title in the suit property by virtue of sale-deed obtained from Kesarbai. If title of the defendant was claimed under a sale-deed and also on the basis of adverse possession the alternative case that the defendant became tenant from Kesarbai was redundant case. Upon this plea no specific issue was required to be framed by the Trial Court. If the Trial Court did not frame any issue on this irrelevant plea it committed no illegality nor such issue was required to be framed and referred to the competent authority under section 85A of the Bombay Tenancy Act, 1948 for adjudication. Thus, the first substantial question is answered in negative.

Coming to the second substantial question I have gone through the judgments of the two Courts below and also considered the arguments advanced by learned Counsel for the appellants and respondent. Controversy arose in the Trial Court regarding the date of execution of

sale-deed. Initially the case of the defendant was that he purchased the property in suit from Kesarbai on 10.5.1966 from Rs.4,000/-. At the same time she admitted in the written statement that the sale-deed was executed and registered on 10.5.1956. The plaintiff stated on oath that the sale-deed is dated 10.5.1956. In the witness box the defendant tried to develop the story that the sale-deed is dated 10.5.1966 and not of 10.5.1956. The sale-deed was in his possession but the defendant did not file the same. Not even certified copy of the sale deed was obtained from the Sub-registrar and filed in the Court below. The entires in village form in these circumstances were rightly ignored by the Trial Court. The Trial Court came to the conclusion that the sale-deed is dated 10.5.1956 and the defendant failed to discharge the onus that the sale-deed is dated 10.5.1966. This finding of fact was not disturbed by the lower Appellate Court. Consequently it has to be held that the sale-deed in favour of the defendant was dated 10.5.1956.

In view of the above finding, the second substantial question has also to be answered against the appellant. The reason is that the Hindu Succession Act, 1956 came into force with effect from 17.6.1956. The lower Appellate Court has wrongly mentioned this date as 17.5.1956. If the Hindu Succession Act came into force on 17.6.1956 and the sale-deed was executed by Kesarbai in favour of the defendant on 10.5.1956 i.e. before the commencement of Hindu Succession Act, she could not hold and possess the property from her husband as absolute owner even within the scope of Section 14 of the Hindu Succession Act. It may also be mentioned that after execution of sale-deed on 10.5.1956 the Vendor must have passed on possession to the purchaser. It is difficult to understand that the purchaser could have postponed delivery of possession to him for future date inspite of obtaining registered sale-deed in his favour. If the possession of the property was transferred by Kesarbai in favour of the defendant on 10.5.1956 then it can again be held that Kesarbai was not in possession of the disputed property either as absolute owner or as a female having limited estate on the date of the commencement of Hindu Succession Act. Consequently she had no right to transfer the disputed properties to the defendants.

Section 14 of the Hindu Succession Act, 1956 provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. In view of thi section female Hindu can be said to be a full owner of the property only when

it is established that the property was possessed by her on the date of commencement of the Act. Acquisition of property by female Hindu before and after commencement of the Act is relevant only in this context that after such acquisition female Hindu must be in possession of the property on the date of commencement of the Act or on a date after the commencement of the Act. No other interpretation to this section is permissible. Thus, even if Kesarbai inherited the property from her husband as limited owner upon death of her husband she being not in possession of the same on the date of commencement of Hindu Succession Act could not be held to be full owner of the property. Learned Counsel for the Appellants drew my attention to the explanation to section 14 of the Hindu Succession Act. This explanation also does not help his contention that Kesarbai was absolute owner of the property on the date she executed the sale-deed in favour of the defendant i.e. on 10.5.1956.

It is in evidence that two fields were given to Kesarbai by her husband in lieu of maintenance. As such she got limited estate from her husband since she was not in possession even of this limited estate, on the date she executed sale-deed in favour of the defendant she could not be said to be the owner of the suit premises when the sale-deed was executed. In view of this legal position, there is no scope for accepting the arguments advanced by learned Counsel for the Appellants that Kesarbai became full owner of the property in suit and she was competent to transfer the same to the defendant.

Plea of adverse possession and bar of limitation was rightly repelled by the two Courts below. The findings of the two Courts below on these two pleas do not require any interference in this Second Appeal.

Arguments were advanced by the learned Counsel for the Appellants on the plea of resjudicata discussed by the two Courts below. Reliance was also placed upon the case of Allahabad Development Authority Vs. Nasiruzzaman and others 1996(6) SCC 424. I have gone through this case. It is not directly on the point under consideration in this Second Appeal. It was in respect of the notification under section 4(1) of the Land Acquisition Act.

Since it is not established on fact or in law that Kesarbai was the owner of the suit property on 10.5.1956 she had no right to execute the sale-deed and as such plea of bar of resjudicata need not be discussed in detail. The findings of the two Courts below on the

point of resjudicata also do not require any interference.

In short it may be mentioned that earlier suit was filed by the present plaintiff against the present defendants for declaration that Kesarbai had no authority to execute the sale-deed in favour of the defendants and the said sale-deed was null and void. A prayer was also made for setting aside the sale-deed It was Suit No.58 of 1966. The said suit was decreed in part and only declaratory relief was granted and the sale-deed was not set aside or cancelled. Time barred appeal was filed by the defendant. The application for condonation of delay in filing the Appeal was moved which was dismissed with the result that the First Appeal was dismissed being time barred. No Second Appeal was filed against that decree. Consequently the defendant cannot be permitted to say that in the earlier suit he was not given any opportunity of hearing, hence the said decision is not binding on him. No doubt, it was exparte decision against the defendant but since despite service of summons he did not appear in the Trial Court, the Trial Court had no option but to proceed exparte against him. The said decree cannot be avoided on this ground.

In the said suit this question was also directly and substantially involved whether the sale-deed executed by Kesarbai was invalid. The validity of the sale-deed was challenged on the ground that Kesarbai had only limited estate in the property and she was not full owner even on the date of commencement of Hindu Succession Act, hence, she had no right to transfer the disputed land to the defendant. There was thus similar controversy involved in the earlier suit, as is involved in this suit and since the finding was given in the earlier suit against the defendant the judgment and decree in the earlier suit will operate as resjudicata in the present suit and appeal. Moreover the question that Kesarbai became absolute owner of the property was directly and substantially involved in the earlier suit and the finding given in the earlier suit will certainly operate as resjudicata against the defendants, no matter the defendant who was defendant in the earlier suit also did not prefer to contest the suit. In the previous suit between the same parties decision by the Competent Court on the material controversy will certainly be binding and in any case will operate as resjudicata. The two Courts below therefore did not commit any illegality in holding that defence was barred by resjudicata. The substantial question no.2 is also answered in negative.

In the result, there is no merit in this Appeal which is liable to be dismissed. The Appeal is accordingly dismissed. Parties to bear their own costs.

Sd/-

(D.C.Srivastava, J)

m.m.bhatt